

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

NORMAN P. LEVENTHAL
MEREDITH S. SENTER, JR.
STEVEN ALMAN LERMAN
RAUL R. RODRIGUEZ
DENNIS P. CORBETT
BRIAN M. MADDEN
BARBARA K. GARDNER
STEPHEN D. BARUCH
SALLY A. BUCKMAN
NANCY L. WOLF
DAVID S. KEIR
DEBORAH R. COLEMAN
NANCY A. ORY
WALTER P. JACOB
LINDA D. FELDMANN
RENÉE L. ROLAND
ROSS C. GREENBERG
JOHN D. POUTASSE
MATTHEW H. BRENNER

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

DOCKET FILE COPY ORIGINAL WWW.LSL-LAW.COM

February 17, 1998

RECEIVED

FEB 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WRITER'S DIRECT DIAL
202-416-6780

WRITER'S E-MAIL
DCORBETT@LSL-LAW.COM

VIA HAND DELIVERY

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264

Dear Ms. Salas:

On behalf of Davis Television Corpus Christi, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 38 at Corpus Christi, Texas, Davis Television Duluth LLC, applicant for a construction permit for Channel 27 at Duluth, Minnesota, Davis Television Fairmont, LLC, applicant for a construction permit for Channel 66 at Fairmont, West Virginia, Davis Television Pittsburg, LLC, applicant for a construction permit for Channel 14 at Pittsburg, Kansas, Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas, Davis Television Waterville, LLC, applicant for a construction permit for Channel 23 at Waterville, Maine, and Davis Television Wausau, LLC, applicant for a construction permit for Channel 55 at Wittenberg, Wisconsin, I am transmitting herewith an original and nine copies of their Joint Reply Comments in the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

DPC:kbs
Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
FEB 17 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

To: The Commission

**JOINT REPLY COMMENTS OF DAVIS TELEVISION CORPUS CHRISTI, LLC;
DAVIS TELEVISION DULUTH, LLC; DAVIS TELEVISION FAIRMONT, LLC;
DAVIS TELEVISION PITTSBURG, LLC; DAVIS TELEVISION TOPEKA, LLC;
DAVIS TELEVISION WATERVILLE, LLC; AND DAVIS TELEVISION WAUSAU, LLC**

Davis Television Corpus Christi, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 38 at Corpus Christi, Texas, Davis Television Duluth, LLC ("Davis Duluth"), applicant for a construction permit for Channel 27 at Duluth, Minnesota, Davis Television Fairmont, LLC, applicant for a construction permit for Channel 66 at Fairmont, West Virginia, Davis Television Pittsburg, LLC, applicant for a

construction permit for Channel 14 at Pittsburg, Kansas, Davis Television Topeka, LLC ("Davis Topeka"), applicant for a construction permit for Channel 43 at Topeka, Kansas, Davis Television Waterville, LLC, applicant for a construction permit for Channel 23 at Waterville, Maine, and Davis Television Wausau, LLC ("Davis Wausau"), applicant for a construction permit for Channel 55 at Wittenberg, Wisconsin,¹ hereby submit these joint reply comments in response to comments previously submitted regarding the Notice of Proposed Rulemaking in the above-captioned proceeding, released November 26, 1997 (the "Notice"). Davis Television Corpus Christi, LLC, Davis Duluth, Davis Television Fairmont, LLC, Davis Television Pittsburg, LLC, Davis Topeka, Davis Television Waterville, LLC, and Davis Wausau are commonly owned and are hereinafter referred to as "Davis."²

I. BACKGROUND

The Notice sought comment on a wide ranging set of issues, all related to the implementation of a fundamental change in the way in which the Commission awards

¹ On January 30, 1998, Dennis R. Selenka filed an amendment to his pending application for Channel 55 at Wittenberg to substitute Davis Wausau as the applicant as a so-called "White Knight." As a result of a private auction held among the competing Wittenberg applicants, Davis Wausau is now in line to receive the Wittenberg construction permit. See Public Notice, Rept. No. 171, released February 12, 1998 at 8. By counsel's letter dated January 30, 1998, Davis Wausau requested Commission dismissal of its "singleton" application for Channel 33 at Wausau, Wisconsin, noting its understanding that with such dismissal, Channel 33 will be deleted from the Table of Allotments.

² Davis' previous comments in this proceeding were filed by Davis Duluth, Davis Topeka and Davis Wausau. Because of multiple settlements reached in the last week of January, 1998, these replies are filed by a broader group of Davis entities, whose interests are now directly implicated by the Notice. Given the fast changing developments that attended the statutory February 1, 1998, settlement deadline, these additional Davis entities respectfully request leave to file these reply comments.

authorizations for the construction and operation of commercial broadcast and Instructional Television Fixed Service stations. More specifically, the Commission invited input from affected parties and the general public concerning a change from comparative hearings to auctions in the awarding of such authorizations, consistent with the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) (the "Budget Act"). Several aspects of the Notice and the auction process in general are of particular importance to Davis and to other commenters, including: (i) whether "singleton" television station construction permit applications (i.e., those where no competing application has been filed with the FCC) submitted on or before an earlier, publicly announced September 20, 1996, filing deadline (the "September 1996 Filing Deadline") should be granted immediately or subjected to competing applications and a potential auction in the indefinite future, and (ii) the degree of flexibility the Commission should afford applicants in settling their differences pursuant to the mandate of the Budget Act. For the reasons set forth below, Davis strongly believes that singleton applications should be processed and granted immediately, without an auction, and that it is in the best interest of the Commission and the general public that the Commission allow maximum flexibility in approving settlements among competing applicants.

II. THE COMMISSION SHOULD GRANT ALL SINGLETONS WITHOUT SUBJECTING THEM TO AN OPEN AUCTION, A POSITION THAT FINDS SUPPORT IN MANY COMMENTS

In its comments submitted pursuant to the Notice, Davis noted that while the Commission has suggested that no singleton applications filed with the Commission before the July 1, 1997, cut-off (the "July Cut-Off") could be further processed without first soliciting competing applications and subjecting any resulting competing application group to auction,

Davis believes that such prohibitions do not apply to the particular unique circumstances under which several Davis applications were filed. In Davis' view, the September 1996 Filing Deadline constituted a valid "filing window" that would allow all such applications to be processed without necessitating the opening of an additional filing window.³

The essential principal espoused by Davis has found substantial support from other commenters. In analogous contexts,⁴ many voices now urge the Commission not to reopen filing windows that have already closed. See, e.g., Comments of Communications Technologies, Inc. at ¶ 2 ("To accept new mutually exclusive applications . . . would place an unfair burden on those applicants which previously paid for and prepared long form applications as required under the previous Rules. The filing windows should remain closed."); Comments of Tri-County Broadcasting, Inc. at 6 ("Any attempt to permit previously uninterested parties to become involved in the auction process at this stage, long after the close of the original 'filing windows' for the allotments would undermine the rights of those parties which filed during those original windows in a timely fashion."); Comments of James G. Cavallo at ¶13 ("[R]eopening filing windows would serve to unduly delay new service to the public. Accordingly, the Commission should decline any temptation to reopen closed filing windows."); Comments of KM

³ In the interest of brevity, Davis' arguments already submitted to the Commission will not be repeated here in their entirety. It should be noted that with the dismissal of Davis Wausau's application for Channel 33, at Wausau, Wisconsin (supra, at n.1), Davis understands that that particular channel will be deleted and no further window opened.

⁴ Many of the commenters address the situation where multiple competing applications were filed after July 1, 1997, in response to a filing window and now face the prospect of a second, auction-related window. The logic and rationale of these arguments is directly applicable to the arguments advanced by Davis in its Comments — e.g., the September 1996 Filing Deadline was itself a filing window.

Communications, Inc. at 6 (“KM adamantly opposes any proposal to reopen a filing window to permit additional applications to be filed for permit where a filing window was previously opened and has already closed”); Comments of Grace Communications L.C. at 6 (“The Commission should not open up the already-closed windows to new applications. . . . [R]eopening such windows would be fundamentally unfair.”); Comments of NDEE NITCHI’I BINAGODI’Ë at ¶17 (“It is patently unfair to punish . . . timely filings and patient waiting for the Commission to process the applications, by permitting other applicants to file applications at this late a stage.”); Comments of Michael R. Ferrigno at 7 (“If all pending applications were correctly filed in response to a filing window, that at the time of filing was the currently proper procedure, they should not have to endure the added hardship of additional competition.”); Joint Comments of Dakota Communications et al. at ¶8 (“The Commission should not punish those applicants who were diligent in filing their applications and reward those who were not by reopening closed filing windows. Further, a decision to reopen filing windows is in conflict with the congressionally stated objective of rapidly bringing new services to the public, and would also be in conflict with Congress’ direct instruction at expectation of revenue generation should not be the basis of Commission policy.”).

Significantly, several commenters have specifically voiced support for granting singleton applications. See Comments of De La Hunt Broadcasting Corporation at ¶ 2 (“With regard to single applications where no competitive applications were filed: It is totally inappropriate to re-open windows just because one applicant filed. The stability of the entire industry is at stake and one can only envision the Commissions [sic] next step would be to open all renewal filings to a window.”). See generally, Comments of Rio Grande Broadcasting Co. at ¶

31, Comments of Heidelberg-Stone Broadcasting Co. at ¶ 31, Comments of JTL Communications Corporation at 10, Comments of John Power.

There is no logical or equitable reason for treating singleton applicants differently from those facing competition, and Davis urges the Commission to give priority to *all* applicants who filed and continue to prosecute applications before the July Cut-Off. The Commission is not compelled to hold an auction for singleton applications filed in response to the September 1996 Filing Deadline. Rather, such applications should be accepted for filing by public notice, processed expeditiously, and granted without further delay. Such a course of action would clearly serve the public interest by hastening the provision of new television service to the public, a particularly worthy goal where the digital conversion process is underway and the viewing public in the markets for which Davis has applied will clearly benefit from the introduction of new competition and service as rapidly as possible. The Commission should seize this clear opportunity to advance that fundamental policy objective and not delay any step forward by reopening closed filing windows.

III. THE COMMISSION SHOULD DEMONSTRATE MAXIMUM FLEXIBILITY IN APPROVING SETTLEMENTS OF MUTUALLY EXCLUSIVE APPLICATIONS

One of Congress' clear purposes in the Balanced Budget Act was to facilitate settlements and thereby reduce uncertainty and expedite new services that benefit the public. This goal is best achieved through creativity and flexibility in the crafting of such settlements. The Commission should embrace the use of creative solutions to difficult problems. Such problems are bound to arise in situations involving multiple applicants or complex applications.

For example, in the settlement context, the Commission should give full and careful consideration to settlements that involve motions to dismiss unqualified applicants. See Comments of Linear Research Associates at ¶ 3 (“[T]he fact that [an] unqualified applicant has not been included in [a] settlement should not affect the validity of the settlement proposal.”). See also Comments of KLRK Broadcasting and Comments of Pacific Northwest Broadcasting. As a further example, the Commission should lift the 1987 freeze on new allotment requests.⁵ The purpose behind the 1987 Freeze has long ago passed, its function outdated in light of the transition to digital television. The Commission should move decisively forward to accomplish its goal of providing service to the public without unnecessary further delay and expeditiously process applications where a waiver of the 1987 Freeze was appropriately sought. By lifting the obsolete freeze and encouraging creativity and flexibility in crafting settlements, Congress, the Commission and broadcasters will accomplish their common goal of quickly providing new service to the public.

IV. THE COMMENTS OF GULF COAST BROADCASTING, INC. AND NEW LIFE EVANGELISTIC CENTER, INC. ARE WITHOUT MERIT

Finally, certain broadcasters have submitted comments that relate to two Davis markets and are entirely self-serving and without merit.

Gulf Coast Broadcasting, Inc. (“Gulf Coast”), for example, the licensee of existing Corpus Christi television station KRIS-TV, Channel 6, with a transparent incentive to forestall new competition, claims that Section 309(l) of the Communications Act does not apply to Channel 38 at Corpus Christi because the applications tendered are subject to the 1987 Freeze and

⁵ See Advanced Television Systems and Their Impact on Existing Television Service, Order, 76 Rad. Reg. 2d (P&F) 843 (1987) (the “1987 Freeze”).

have not been “accepted for filing” by the Commission. Gulf Coast’s argument is both misguided and factually incorrect. All of the applications for Channel 38 as filed are not subject to the 1987 Freeze and, more importantly, contrary to Gulf Coast’s contention that “the FCC has not established a file number for any of the applications” (Comments of Gulf Coast at 2), all eight applications have been assigned file numbers.⁶ The essential premise of Gulf Coast’s argument is that these applications were not “accepted for filing,” and hence, Section 309(l) is inapplicable. But a closer reading of the section reveals that an application need only be “filed” in order to come within the mandate of Section 309(l). As such, the Commission should not entertain Gulf Coast’s thinly-veiled anticompetitive rhetoric, which seeks to feather an incumbent licensee’s nest at the clear expense of the public interest.

The Comments of New Life Evangelistic Center, Inc. (“New Life”) are no less misguided. In its attempt to resurrect its application for Channel 14 at Pittsburg, Kansas, New Life claims that it was initially unaware that its application for the channel was subject to the 1987 Freeze. But New Life goes on to concede that it “did not ask for a waiver of the freeze, when it filed” its application. Comments of New Life at 1. While New Life may have failed to apply for a waiver of the freeze, two competing applicants did seek such a waiver. Their applications were accordingly not dismissed by the Commission and ultimately assigned file numbers. New Life cannot now use this rulemaking proceeding to try to correct past mistakes. This forum may not

⁶ For the record, the applicants (and their file numbers) are as follows: Davis Television Corpus Christi, LLC (FCC File No. BPCT-960920YW), Humberto Lopez (FCC File No. BPCT-960920YH), Marri Broadcasting, L.P. (FCC File No. BPCT-960920ID), Minority Media TV38, L.L.C. (FCC File No. BPCT-960111LP), Paloma Broadcasting Company, Inc. (FCC File No. BPCT-960920LM), Patricia Card Smith (FCC File No. BPCT-960206KH), Prime Broadcasting Company (FCC File No. BPCT-960920IF) and Sunbelt Broadcasting Company (FCC File No. BPCT-960920IH).

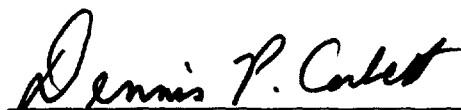
take the place of a timely filed petition for reconsideration of the dismissal, and New Life's comments must be disregarded.

V. **CONCLUSION**

For the reasons stated above, Davis requests that the Commission make clear that it will immediately process all singleton applications for television allotments received by the September 1996 Filing Deadline without opening another window in the future for competing applications, that all settlements made pursuant to the Budget Act will be processed flexibly and creatively, and that Gulf Coast's and New Life's comments will be disregarded as meritless.

Respectfully submitted,

**DAVIS TELEVISION CORPUS CHRISTI, LLC
DAVIS TELEVISION DULUTH, LLC
DAVIS TELEVISION FAIRMONT, LLC
DAVIS TELEVISION PITTSBURG, LLC
DAVIS TELEVISION TOPEKA, LLC
DAVIS TELEVISION WATERVILLE, LLC
DAVIS TELEVISION WAUSAU, LLC**

By: 
Dennis P. Corbett
Ross G. Greenberg

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W.
Suite 600
Washington, DC 20006-1809
202-429-8970

February 17, 1998

Their Attorneys